Chapter 4:
Request Procedures

A. *Written Request*

The PIA envisions a written request. SG §10-614. However, types of records predesignated for immediate release under SG §10-613(c) are to be made available without need for a written request. SG §10-614(a)(2)(i). Furthermore, the agency may waive the requirement for a written application. SG §10-614(a)(2)(ii). An agency need not and should not demand written requests for inspection of agency documents when there is no question that the public has a right to inspect them. For example, an agency's annual report and the agency's quarterly statistics are clearly open to the public for inspection. In other instances, a written request or the completion of an agency request form may help expedite fulfillment of the request when less commonly requested records are sought. A request expressing a desire to inspect or copy agency records may be sufficient to trigger the PIA's requirements, even if it does not expressly mention the words "Public Information Act" or cite the applicable sections of the State Government Article.

In general, there is no requirement that the applicant give the reason for a request or identify him or herself, although he or she is certainly free to do so. The reasons that the information is sought are generally not relevant. *See Moberly v. Herboldsheimer,* 276 Md. at 227; 61 *Opinions of the Attorney General* 702, 709 (1976). These reasons might be pertinent, however, if the applicant seeks a waiver of fees. *See* Chapter II.G above. In addition, the identity of an applicant is relevant if he or she is seeking access in one of the particular situations where the PIA gives a "person in interest" special rights of access. Knowledge of the purpose of the request may sometimes assist a custodian who is required under SG §10-618 to make a "public interest" determination prior to releasing a record. *See* SG §10-614(c)(2)(i).

The request must sufficiently identify the records that the applicant seeks. *See* Letter of advice to Deborah Byrd, Dorchester County Commissioner's Office, from Assistant Attorney General Kimberly Smith Ward (May 7, 1996) (PIA request must sufficiently identify records so as to notify agency of records that the applicant wishes disclosed). *See*

also Sears v. Gottschalk, 502 F.2d 122 (4th Cir. 1974), *cert. denied*, 422 U.S. 1056 (1975) (FOIA calls for reasonable description, enabling government employee to locate requested records). In some instances, applicants may have only limited knowledge of the types of records the agency has and may not be able to describe precisely the records they seek. An agency may appropriately assist an applicant to clarify a request when feasible.

Generally, an agency may not require the Legislative Auditor to submit a written request pursuant to the PIA. However, if an employee of the Legislative Auditor requests information from an agency that is not the subject of the audit without stating an organizational affiliation and without invoking the powers granted under the audit statute (SG §§2-1217 to 2-1227), the agency that receives the request should treat it as a request subject to all of the procedures of the PIA, including the requirement of a written application. 76 *Opinions of the Attorney General* 287 (1991).

B. Time for Response

Under SG §10-614(b)(2), if a record is found to be responsive to a request and is recognized to be open to inspection, it must be produced "immediately" after receipt of the written request. An additional reasonable period "not to exceed 30 days" is available only where the additional period of time is required to retrieve the records and assess their status under the PIA. A custodian should not wait the full 30 days to allow or deny access to a record if that amount of time is not needed to respond. If access is to be granted, the record should be produced for inspection and copying promptly after the written request is evaluated. Similarly, when access to a record is denied, the custodian is to "immediately" notify the applicant. SG §10-614(b)(3)(i). Within ten working days after the denial, the custodian must provide the applicant with a written statement in accordance with SG §10-614(b)(3)(ii). This 10-day period is in addition to the maximum 30-day or (with an agreed extension) 60-day periods for granting or denying a request. *Stromberg Metal Works, Inc. v. University of Maryland*, 382 Md. 151, 158-59, 854 A.2d 1220 (2004). However, in practice, the denial and explanation generally are provided as part of a single response.

There appears to be some conflict between the "immediate" access requirement of SG §10-614(b)(2) and the 30 days allowed to grant or deny a request by SG §10-614(b)(1). This conflict is resolved, however, if the custodian immediately grants access where the right to access is clear. If the custodian, after an initial review of the records, determines that there is a question about the applicant's right to inspect them, then a period of up to 30 days may be used to determine whether a denial is authorized and appropriate. If the problem is that the request is unclear or unreasonably broad, the custodian should promptly ask the applicant

to clarify or narrow the request. The custodian should not wait the full 30 days and deny the request only because it is unclear or unreasonably broad.

The 30-day time periods in SG §10-614(b)(1) and (2) and the other time periods imposed by SG §10-614 may be extended, with the consent of the applicant, for an additional period not to exceed 30 days. SG §10-614(b)(4).

A troubling question is presented where the custodian, acting in good faith, is unable to comply with the time limits set by the PIA. For example, a custodian may have trouble retrieving old records and then, after retrieval, may find that portions of the records must be deleted to protect confidential material from disclosure. Even with due diligence, the custodian may be unable to comply with the request within the time limits set by the PIA. If an extension is not obtainable under SG §10-614(b)(4), the custodian should make the best good faith response possible by: (1) allowing inspection of any portion of the records that are currently available; and (2) informing the applicant, within the imposed time limit, of the reasons for the delay and an estimated date when the agency's review will be complete.

This course should be followed only when it is impracticable for the custodian to comply with the PIA's time limits. Every effort should be made to follow the PIA's time limits. Under FOIA, if an agency can show that exceptional circumstances exist and that it is exercising due diligence in responding to a request, courts have allowed the agency additional time. *See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) (court allowed FBI to handle large volume of requests for information by fulfilling requests on a first-in, first-out basis even though statutory time limits were exceeded). *See also Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976); *Hayden v. Department of Justice*, 413 F. Supp. 1285 (D.D.C. 1976). Other courts have resisted agency efforts to maintain a routine backlog of FOIA requests. *See Ray v. Department of Justice*, 770 F. Supp. 1544 (S.D. Fla. 1990) (routine administrative backlog of requests for records did not constitute "exceptional circumstances" allowing agency to respond outside FOIA's 10-day requirement). *Accord*, *Mayock v. INS*, 714 F. Supp. 1588 (N.D. Cal. 1989), *rev'd*, 938 F. 2d 1006 (9th Cir. 1990).

While the time limits in the PIA are important and an agency or custodian may be sanctioned in a variety of ways under the statute for a failure to comply, an agency's failure to respond within the statutory deadlines does not waive applicable exemptions under the Act. "[T]he custodian [is not] required to disgorge records that the Legislature has declared should not be disclosed simply because the custodian did not communicate his/her decision

in a timely manner." *Stromberg Metal Works Inc. v. University of Maryland*, 382 Md. 151, 161, 854 A.2d 1220 (2004).

C. Records Not in Custodian's Custody or Control

If a written request for access to a record is made to a person who is not the custodian, that person must, within 10 working days of the receipt of the request, notify the applicant of this fact and, if known, the actual custodian of the record and the location or possible location of the record. SG §10-614(a)(2).

D. Written Denial

When a request is denied, the custodian must provide, within 10 working days, a written statement of the reasons for the denial, the legal authority for the denial, and notice of the remedies for review of the denial. SG §10-614(b)(3)(ii); *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 841 A.2d 10 (2004) (denial letter was legally deficient as it that failed to explain reason for denying access under SG §10-618(f)(1) in connection with closed investigation). A sample denial letter is contained in Appendix B. An index of withheld documents is not required at the administrative denial stage, so long as the letter complies with SG §10-614(b)(3)(ii). Generally, a denial letter should be reviewed by the agency's legal counsel before it is sent out to ensure that the denial is correct as a matter of law and to ensure that the three elements in SG §10-614(b)(3)(ii) are adequately and correctly stated in the letter.

Before sending a denial letter and after consulting with counsel, a custodian may consider negotiating with the applicant or the applicant's attorney. The applicant may wish to withdraw or limit the part of the request that is giving the agency difficulty and thus avoid the need for a formal denial.

E. Administrative Review

If an agency is subject to the "contested case" provisions of the Administrative Procedure Act, Title 10, Subtitle 2 of the State Government Article, the agency must provide the applicant with the opportunity for an administrative review in accordance with contested case hearing procedures. The PIA requires that any applicant who makes a request be given an APA hearing, despite the fact that it often makes little sense to have such a hearing. Adjudicatory hearings of this type are most appropriate for factual disputes, whereas the issue in a PIA denial is usually one of law (*e.g.* the scope of a statutory exception) that the agency

should have fully considered prior to the denial. Nevertheless, the PIA is explicit, and denial letters from agencies subject to APA contested case provisions should indicate this procedure as an available remedy for review.

By the express terms of SG §10-622(c), however, the applicant does not have to exhaust administrative remedies under the APA before seeking judicial review under SG §10-623. Similarly, a prisoner need not exhaust administrative remedies under Prisoner Litigation Act before filing civil action in circuit court in connection with PIA request relating to conditions of confinement. *Massey v. Galley*, 392 Md. 634, 898 A.2d 951 (2006).

F. Judicial Enforcement

The PIA provides for judicial enforcement of the rights provided under the Act. SG §10-623. It calls for a suit in the circuit court to "enjoin" an entity, official, or employee from withholding records and order the production of records improperly withheld. Literally, SG §10-623 refers only to persons denied "the right to inspect" a record. It does not explicitly refer to the right to obtain copies. Despite this oversight, it is likely that a court would construe SG §10-623 to provide for judicial scrutiny of an agency's refusal to provide copies.

1. Limitations

The Court of Special Appeals has held that actions for judicial review under SG §10-623 of the PIA are controlled by §5-110 of the Courts and Judicial Proceedings Article, which has a two-year limitations period, rather than by former Rule B4, which would require the action to be brought within 30 days. The Court did not decide whether proceedings under SG §10-623 are subject to any other rules governing administrative appeals. *Kline v. Fuller*, 56 Md. App. 294, 467 A.2d 786 (1983). Given that a requester may make a new PIA request after a period of limitations has expired concerning the denial of a prior request, the Court of Special Appeals has characterized the two-year limitations period as of "minuscule significance." *Blythe v. State*, 161 Md. App 492, 512, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005).

2. Procedural Issues

- **Venue.** Venue is proper where the complainant resides or has a principal place of business or where the records are located. SG §10-623(a)(1). *See Attorney Grievance Commission v. A.S. Abell*, 294 Md. 680, 452 A.2d 656 (1982).

- **Answer.** The defendant must answer or otherwise plead within 30 days after service, unless the time period is expanded for good cause shown. SG §10-623(b).

- **Expedited hearing.** SG §10-623(c)(1) provides for expedited court proceedings in PIA cases. The agency and counsel should cooperate if the plaintiff seeks a quick judicial determination.

- **Intervention.** In some cases, it may be appropriate for a third party to intervene in an action for disclosure. For example, if the issue is the release of investigatory, financial, or similar records, the person who is the subject of the records may wish to intervene under Maryland Rule 2-214. In an appropriate case, particularly one involving confidential business records, the agency should consider inviting affected persons to intervene. An affected person's failure to seek intervention may itself be an indication that the records are not truly confidential.

3. Agency Burden

The burden is on the entity or official withholding a record to sustain its action. SG §10-623(b)(2)(i). If the custodian invokes the agency memoranda exception, however, and the trial court determines that one of the privileges embraced within that exemption applies, the custodian will have met the burden of showing that disclosure would be contrary to the public interest. *Cranford v. Montgomery County*, 300 Md. 759, 776, 481 A.2d 229 (1984). The PIA specifically provides that the defendant custodian may submit a memorandum to the court justifying the denial. SG §10-623(b)(2)(ii). *Cranford* discusses the level of detail necessary to support a denial of access.

To satisfy the statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision. In some circumstances, a court may require the agency to file a *Vaughn* index (named after the *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)) detailing each record withheld or redacted by author, date, and recipient, stating the

particular exemption claimed, and providing enough information about the subject matter to permit the requester and court to test the justification of the withholding. *See Blythe v. State*, 161 Md. App. 492, 521, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005).

A regulatory agency that denies a person in interest access to an investigatory file under SG §10-618(f)(1)(ii) must establish first, that the file was compiled for a law enforcement purpose and second, that disclosure would have a prejudicial effect under SG §10-618(f)(2). *Fioretti v. State Board of Dental Examiners*, 351 Md. 66, 716 A. 2d 258 (1998) (holding in plaintiff's favor because the agency failed to support its motion to dismiss with affidavits, a summary of the file, or other relevant evidence).

In contrast, a law enforcement agency enumerated under SG §10-618(f)(1)(i) is presumed to have compiled an investigatory file for law enforcement purposes. *Blythe v. State*, 161 Md. App. 492, 525-26, n.6, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005). Because a generic determination of interference with a pending investigation can be made, a *"Vaughn* index" listing each document, its author, date, and general subject matter, and the basis for withholding the document, is not required. *See Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 737 A.2d 592 (1999).

However, the custodian nevertheless bears the burden of "demonstrating, with particularity and not in purely conclusory terms, precisely why the disclosure [of an investigatory record] 'would be contrary to the public interest'" and exploring the feasibility of severing a record "into disclosable and non-disclosable parts." *Blythe v. State*, 161 Md. App. 492, 527, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005).

The court may examine the questioned records *in camera* to determine whether an exception applies. SG §10-623(c)(2). *See Equitable Trust Co. v. State Comm'n on Human Relations*, 42 Md. App. 53, 399 A.2d 908 (1979), *rev'd on other grounds*, 287 Md. 80, 411 A.2d 86 (1980). SG §10-623(c)(2), allowing *in camera* inspection, is discretionary, not mandatory. Whether an *in camera* inspection will be made ultimately depends on whether the trial judge believes that it is needed to make a responsible determination on claims of exemption. *Cranford v. Montgomery County*, 300 Md. 759, 779, 481 A.2d 221, 231 (1984). *See also Zaal v. State*, 326 Md. 54, 602 A.2d 1247 (1992), where the Court discussed alternative approaches to protect sensitive records.